Nos. 14-556, 14-562, 14-571, 14-574

In the Supreme Court of the United States

SUPREME COURT, U.S.
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JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL COALITION OF BLACK PASTORS AND CHRISTIAN LEADERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, National Coalition of Black Pastors and Christian Leaders, respectfully submit this brief.[1] *Amici* represent the interests of over 25,000 Churches and Ministries that include over 3 million laity. *Amici* lead their pastoral communities, preach, and spread the good news of God's love. As pastors, *Amici* are considered shepherds who guide their church communities in accordance with time-proven Biblical values and truth. For *Amici,* the Bible expresses sound, ethically-grounded doctrine upon which individuals beneficially rely regarding family matters. *Amici* bear the responsibility to oppose unsound, morally-relative doctrines and to oppose practices that are harmful to the following of God's time-proven teachings. *Amici*, therefore, hold a vested interest in a State's right to correctly define marriage.

Amici hold a strong interest in the protection of marriage nationally. Over the past year, the issue of State marriage redefinition aggressively wrestled its

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[1] The Respondents granted blanket consent for the filing of *amicus curiae* briefs in this matter. Pursuant to Rule 37(a), *Amici* gave 10-day notice of their intent to file this brief to the Respondents. Petitioners did not grant blanket consent, therefore *Amici* obtained the consent for the filing of this brief from the four *Counsels of Record* for the Petitioners. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

way onto the national stage. *Amici* submitted several amicus briefs across the country, including in *DeBoer v. Synder*, Pet. App. 1a-102a; *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2015), *cert. denied* 135 S. Ct. 265 (Oct. 6, 2014); *Rainey v. Bostic*, 760 F.3d 352 (4th Cir. 2014), *cert. denied* 135 S. Ct. 286 (Oct. 6, 2014), and *Robicheaux v. Caldwell*, No. 14-31037 (5th Cir.).

SUMMARY OF THE ARGUMENT

This case is about a State's sovereign right to recognize a union between a man and woman as the correct definition of marriage. The Sixth Circuit upheld the constitutionality of state marriage provisions passed by vast voter majorities in Michigan,[2] Kentucky,[3] Ohio,[4] and Tennessee.[5] In doing so, the Sixth Circuit upheld democratic processes supported by approximately twenty-two million Americans in those states.[6]

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[2] Fifty-nine percent of Michigan voters approved the traditional definition of marriage. 14-571 Pet. App. 16a ("Pet. App.").

[3] Seventy-four percent of Kentucky voters approved their State's definition of marriage. Pet. App. 18a.

[4] Sixty-two percent of Ohio voters supported Ohio's definition of marriage. Pet. App. 19a.

[5] Eighty percent of Tennessee voters approved their definition of marriage. Pet. App. 21a.

[6] The Sixth Circuit estimated that the population of Kentucky, Michigan, Ohio, and Tennessee totaled thirty-two million. Pet. App. 15a. The average voter approval for the tradition definition of marriage in those states totals almost sixty-nine percent. *See* Pet. App. 16a, 18a, 19a, 21a.

The Court presents the question "Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?"[7] This question inherently poses two inquiries: 1) whether a non-politically accountable court can force a State to improperly redefine marriage and 2) whether refusing to redefine marriage denies individuals engaging in homosexual conduct a "fundamental right" to marry.

The Constitutions and marriage laws of Michigan, Kentucky, Tennessee, and Ohio do not serve a discriminatory purpose; the State Constitutions and marriage laws affirm the correct definition of marriage—a union of one man and one woman. Mich. Const. art. I, § 25; Ky. Const. § 233A; Ohio Const. art. XV, § 11; Tenn. Const. art. XI, § 18. It is the right of each State's voters to correctly codify the long-standing definition of marriage as between a man and woman. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of

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[7] The Court has also asked "Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" While *Amici* believe that the answer to that question is "no" and that a State cannot lawfully be forced to redefine marriage in any form, *Amici* do not address this question in the balance of their brief and focus solely on the first question posed by the Court. But to answer the question posed under the Privileges and Immunities Clause in the affirmative would be to grant States that chose to recognize so-called same-sex marriage the equivalent of veto power over those States who adhere to the true meaning of marriage. That is clearly antithetical to our federal system of government.

the States") (*quoting Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

As Christian pastors, *Amici* know that all human beings have inherent value because God created every person in His image. Thus, it is *Amici*'s position that the government should never classify or discriminate against another human being based on who they are. A person's sexuality and sexual preferences, however, are *not* their state of being, or even an immutable aspect of who they are, as race is. The truth is that sexual conduct is an activity. For *Amici*, truth matters.

A State has no responsibility to promote any person's sexual proclivities, whether heterosexual, homosexual, or otherwise—and certainly is not required to accept that one's sexual conduct preference is the same as an immutable characteristic like race. No reliable evidence exists before any of the lower courts in support of such a deceptive contention. Government may not regulate people based on who they are, but it may regulate their conduct, including sexual conduct. Even more germane to this case is the principle that government need not—and, indeed, may not—force its citizens to promote a type of sexual behavior to which its citizens object.

Our brief addresses three reasons why this Court must uphold the Sixth Circuit's correctly decided opinion. First, the Sixth Circuit properly applied the reasoning behind the landmark case of *Loving v. Virginia*. Pet. App. 31a. In doing so, the Sixth Circuit refused to use faulty logic to contort *Loving's* holding into a fundamental right for individuals to marry any other person(s) of their choice regardless of the person's gender. Pet. App. 46-50a. Second, the Sixth Circuit

properly recognized that law should be based on our Nation's Constitution, adopted pursuant to our deeply rooted history and legal traditions, rather than the current whims of certain parties or unelected judges. Pet. App. 14a, 31a, 32a. Third, the Sixth Circuit adequately considered the contentious and inconclusive factual record of the trial court concerning "optimal child outcomes." Pet. App. 15a-16a, 26a-27a.

Petitioners assert that State-approved marriage violates the Due Process and Equal Protection Clauses. Pet. App. 17a. It does not. The Sixth Circuit's opinion explains this in an exceptionally thorough and well-reasoned analysis. Pet. App. 1a-102a. Petitioners ask this Court to reject the Sixth Circuit's exact consideration of our Nation's federal tradition, history, and morality.[8] In doing so, Petitioners ask this Court to supplant the convictions of State voters, and the morality and social structure on which our nation was built, with the Petitioners' moral relativism.

In no uncertain terms, Petitioners ask this Court to commit an act of judicial overreach, aggrandize the power of a limited federal judiciary, and improperly diminish the power of the States. This Court should decline Petitioners' invitation.

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[8] Petitioners Obergefell, *et al.*, Brittani Henry, *et al.*, and Valeria Tanco, *et al.*, only address the second question posed by the Court pertaining to the Privileges and Immunities Clause.

ARGUMENT

I. *LOVING v. VIRGINIA* DOES NOT REQUIRE MARRIAGE REDEFINITION.

The Fourteenth Amendment holds special significance for Black Americans. The text of the Fourteenth Amendment guarantees that "no state shall deny to any person within its jurisdiction equal protection of the laws." U.S. Const., amend. XIV, § 1. When the Equal Protection Clause became law in 1868, many Black Americans were recently emancipated slaves. Four years later in 1872, the Supreme Court suggested that race discrimination was "the evil [the Civil War Amendments] were designed to remedy," *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) ("We do not say that no one else but the negro can share in [their] protection, but . in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy."). It took nearly a century after the Civil War for the Supreme Court to enforce a modicum of what we now know as substantive equality. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Comparing the dilemmas of same-sex couples to the centuries of discrimination faced by Black Americans is a deceptive distortion of our country's culture and history. The disgraces in our nation's history pertaining to the civil rights of Black Americans are unmatched. No other class of individuals, including individuals who are same-sex attracted, have ever been enslaved, or lawfully viewed not as human but as property. *See, e.g.*, Stacy Swimp, *LGBT Comparison of*

Marriage Redefinition to Historical Black Civil Rights Struggles is Dishonest and Manufactured (March 7, 2014), (http://stacyswimp.net/2014/03/07/lgbt-comparison-of-marriage-redefinition-to-historical-Black-civil-rights-struggles-is-dishonest-and-manufactured). Same-sex attracted individuals have never lawfully been forced to attend different schools, walk on separate public sidewalks, sit at the back of the bus, drink out of separate drinking fountains, denied their right to assemble, or denied their voting rights. *Id.* The legal history of these disparate classifications, *i.e.*, immutable racial discrimination and same-sex attraction, is incongruent. Yet, some judges have mistakenly understated this incongruence to manufacture and mandate the ill-conceived and apparently limitless concept of "marriage equality."

The Hawaii Supreme Court first ruled that a State's failure to promote so-called "same-sex marriage" violated the State's Equal Rights Amendment. *Baehr v. Lewin*, 74 Haw. 530 (Haw. 1993). This marked the first time a court used the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), to blur the line of a suspect class (race) and a non-suspect class (sexual preference) in Equal Protection Clause analysis.

To understand why this analysis is incorrect, it is essential to understand the holding in *Loving v. Virginia*—that a State's statutory scheme to prevent marriage between a man and a woman on the basis of racial classifications violated the Equal Protection Clause. *Id.* at 11. The plaintiffs in *Loving* were two Virginia residents, a black woman and a white man. *Id.* at 3. The plaintiffs legally married in Washington, D.C. and returned to Virginia. *Id.* Virginia, however,

considered interracial marriage a criminal offense, and the plaintiffs were charged and pleaded guilty to violating Virginia's ban on interracial marriage and sentenced to a year in jail. *Id.* The Supreme Court struck down Virginia's ban:

> At the very least, the Equal Protection Clause demands that *racial classifications be subjected to the "most rigid scrutiny,"* and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. *There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification.* We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.

Id. at 10-12 (emphasis added).

Loving was about *racial discrimination.* The *Baehr* Court improperly expanded *Loving* by plucking from its dicta that: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." *Baehr*, 74 Haw. at 562-63 (quoting *Loving*, 388 U.S. at 12). This statement is followed in *Loving*, however, by the *critical qualification* that this fundamental freedom is not to be denied "on so unsupportable a basis as [] *racial classifications.*" *Loving*, 388 U.S. at 12 (emphasis added).

The Supreme Court in *Loving* never contemplated, much less addressed, "same-sex marriage." This concept was fully understood and analyzed by the Sixth Circuit Court. Pet. App. 48a ("When *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning."). Petitioners ignore this truth and want this Court to adopt the faulty logic used in *Baehr*. Petitioners wish this Court to assume, without reasoned explanation, that because *racial* discrimination is morally wrong and unconstitutional, it necessarily follows that a State cannot recognize the historical and moral value that marriage is between a man and woman. *Loving* actually affirmed the foundational institution of marriage—the union of a man and woman, regardless of their race. It did not hold, as *Baehr* erroneously surmised, that marriage is the union of two (or more) people regardless of their gender, co-sanguinity, or any other factor. As the *Baehr* dissent correctly pointed out, "*Loving* is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples." *Id.* at 588 (Heen, J., dissenting).

Petitioners misapprehend *Loving's* holding regarding the fundamental right to marriage. Petitioners reiterate a correct statement of the law in the sense that *Loving* affirmed the fundamental constitutional right of a *man and woman to marry* because "[m]arriage [between a man and a woman] is . . . fundamental to our very existence and survival." *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942). But then Petitioners irrationally and unconstitutionally attempt to extend *Loving* and its progeny to create a new federal right of the freedom of

choice to marry without any qualification whatsoever. *Loving* emphasized the importance of marriage to all Americans, in the true sense of the word. It did not re-define the word. *See* Pet. App. 46a-48a. If one redefines "marriage" to mean whatever anyone wants it to mean, it has no definition and is no longer useful as a bearer of meaning.

Loving did not require this destruction of marriage. It did not hold that if prohibited conduct is defined by reference to a proclivity, then that prohibition violates the Fourteenth Amendment. *See* S. Girgis, R.P. George, & R.T. Anderson, What is Marriage? 34 Harv. J. L & Pub. Pol'y, 245, 249 (2011) ("antimiscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally related to the latter question"). Thus, it is clear that the instant case is not about civil rights as Petitioners erroneously suggest. It is, rather, about political activists seeking to use judicial power to bypass the will of the people, in order to judicially coerce civil acceptance of homosexual behavior.

There is no fundamental right for certain individuals to call their alternative arrangements "marriage"—and to compel others who disagree to not only assent to, but contribute to, the support of that redefined institution. Indeed, such coercion would violate the fundamental right of marriage for those who support marriage's true meaning. *Loving* does not support Petitioners' mindless "marriage equality" slogan, which is ultimately standard-less and renders marriage equally meaningless for all. *Id.* at 269-75.

All States *routinely* require certain qualifications to obtain a marriage license and disallow certain

individuals who do not meet those qualifications. States discriminate against first cousins. States discriminate against bigamists, polygamists, pedophiles, sibling couples, parent-child couples, and polyamorists in the licensing of marriage, and it is within the States' rights to do so. *See, e.g.*, Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, National Public Radio: *All Things Considered*, May 27, 2008 (discussing the illegality of polygamy in all fifty States); *Lesbian 'throuple' proves Scalia right on slippery slopes*, Washington Times Editorial, Apr. 25, 2014, http://www.washingtontimes.com/news/2014/apr/25/editorial-throuple-in-paradise/ (lesbian threesome claim to have married).

Under Petitioners' reasoning, however, such restrictions would no longer be valid. Petitioners urge this Court to discard the long-established proper limits on marriage under State law and, acting as a super-legislature, replace the traditional and rational definition of marriage with one that has no discernible limits. If "marriage" means fulfilling one's personal choices regarding intimacy, as Petitioners insist, it is difficult to see how States could regulate marriage on any basis. If personal autonomy is the essence of marriage, then not only gender, but also number, familial relationship, and even species are insupportable limits on that principle, and they all will fall. Petitioners' proposal is not just a slippery slope, it is a bottomless pit.

There are critical differences between race and sexual preference classifications. Race is a suspect class, and racial discrimination triggers strict scrutiny review. In order for a law to survive strict scrutiny, the

State interest involved must be more than important —it must be *compelling*. *Loving*, 388 U.S. at 11. And the law itself must be *necessary* in order to achieve the objective. *Id.* If any less discriminatory means of achieving the goal exists, the law will fall. *Id.* It is rare for a law to survive strict scrutiny review.

The Court should review the issue of so-called homosexual marriage not under an implicit or even explicit heightened review, but as any other law that does not involve a suspect class. One's sexual preference triggers mere rational basis review. Pet. App. 31-31a; *Romer v. Evans*, 517 U.S. 620 (1996).[9] A court undertaking rational basis review asks only whether "there is some rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ. v. American Assoc. of University Professors*, 526 U.S. 124, 128 (1999) (*citing Heller v. Doe*, 509 U.S. 312, 319-321 (1993)). It is within a State's right to define marriage between a man and a woman when that licensing restriction passes rational basis review.

Loving does not require a higher standard. *Loving* only employed a higher standard because race is a suspect class, and it counsels the opposite outcome in this case: the protection of our State citizenry's

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[9] Other *Amicus Curiae* urge that since "[t]he President and the Attorney General have determined that classifications based on sexual orientation should be subject to heightened scrutiny" that this Court should overrule itself. *See* Br. of United States, *Amicus Curiae* Supp. Pet'rs at 2. But the judiciary is not the pawn of the executive branch. And endlessly important and culturally impactful legal decisions should not be based on what is politically popular for the federal executive branch.

fundamental right of marriage as truthfully defined. The law treats racial classifications as wholly distinct from sexual preference classifications. Here, such different classifications necessarily yield different outcomes. Petitioners' analysis misapplies existing law and heightens sexual preference to the same level of immutable classes, such as race. That conclusion is wrong and void of factual, historical, and legal support. The Sixth Circuit properly indentified the fatal flaws in Petitioners' arguments. Pet. App. 46a-48a; *see also Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919 (E. D. La. 2014).

Finally, we protest Petitioners' attempt to equate this case to *Loving* under the banner of "marriage equality." Petitioners essentially claim that their proposed redefinition improves marriage by adding a necessary element of "equality" to it. This is certainly a clever ploy, for who can oppose equality? But that is all that it is, a ploy. It is not a valid point.

Marriage already has all the equality it can contain without destruction of its meaning, purpose, and proper boundaries.[10] Any legally competent man can marry any legally competent woman, regardless of his or the woman's race, religion, national origin, or even sexual preference, and vice versa. The problem

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[10] Petitioners argue that they can take our social body's fundamental building block, remake it in their own amorphous image, and society will be healthier. They essentially argue they can remove the walls from our cells, place them back in the body, and the body will be healthier. It will not. Cells without walls will die, and with them the body.

Petitioners claim this Court must resolve is one that does not exist. True *marriage* equality already exists.

What Petitioners actually seek is not equality but instead a self-indulgent form of inclusiveness that demands acceptance, and indeed support, of a wide variety of sexual conduct. And once Petitioners' inclusiveness camel gets its nose in the marriage tent, marriage will not be a better tent; it will be trampled and destroyed. Petitioners desire to redefine marriage to fit both heterosexual and homosexual preferences.[11] They deem this their right to "autonomy." Petitioners' Brief at 21, 57. They thus proffer a subjective view of the reality of marriage. But a subjective view of reality has as many realities as it has subjects. If everyone can define what marriage means to him or her, *and the State must accede to that view*, where will that lead us? What will the state of our society then be? Will it be the Utopia of freedom and growth that Petitioners imply, or will it degenerate into chaos? Is that a chance that this Court is rightfully empowered to take?

Let us spell out the truth about Petitioners' inclusiveness and autonomy arguments as simply as we can. If someone wants to go bowling, they can go to a bowling alley with whomever they choose—a friend of the same or opposite gender, or five such friends, or a child (or their favorite pet, perhaps, in a more

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[11] Petitioners' position is internally inconsistent and self-defeating. If the Court must be forced to re-define marriage according to sexual preference because not doing so is discriminatory, then the Court would be furthering discrimination by not also allowing *bi-sexual* individuals to marry two spouses of opposite sexes in order to fulfill their desired union for companionship.

"enlightened" establishment). And they can all bowl together. But if that same entourage goes into a bowling alley and demands that they be permitted to "bowl" using pogo sticks, hula hoops, parasols, and buckets and buckets of whipped cream—but no balls or pins, because those offend their sensibilities—the proprietor will be completely justified in denying that request. He will not be denying them their fundamental right to bowl. He will not be unfairly discriminating against them or treating them like second-class citizens. He will not be manifesting "hate." He will merely be telling them the truth: What they want to do is their business, but it's not bowling. And if the truth offends their sensibilities, that is their problem, not his. They simply have no cause of action against him.

Petitioners' plight is no different. They have the fundamental right to marry. No one is denying them that. They do not have the right to tell the rest of the country that we must recognize their non-marital relationship to be the same as marriage. It is not. They may be dissatisfied with the fact that their view of marriage does not comport with reality, but if their dissatisfaction is to be remedied, it is their view or some other aspect of their behavior that must change, not reality.

II. COURTS SHOULD NOT SUPPLANT THIS NATION'S DEEPLY ROOTED MORAL AND LEGAL TRADITIONS WITH THEIR OWN PERSONAL MORAL RELATIVISM.

Petitioners hypocritically ask this Court to eschew considerations of morality when assessing the constitutionality of a State's definition of marriage.

Yet, Petitioners actually seek to replace the morality of the Judeo-Christian tradition on which our country was founded with the trendy, relativist morality of political correctness.[12] Petitioners claim that this case is a matter of autonomy. But Petitioners really want to jettison our Founders' sound judgment on that issue and just replace it with their unfounded opinions.[13]

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[12] Like any lawgiver, the court cannot avoid the application of morality. *See, e.g.*, Senator Barack Obama, Keynote Address to Sojourners at the 'Call to Renewal' Conference (June 28, 2006) ("Our law is by definition a codification of morality, much of it grounded in Judeo-Christian tradition."). And as the Sixth Circuit stated when analyzing so-called "same-sex marriage" cases, our "[t]radition reinforces the point." Pet. App. 31a.

[13] *See, e.g.*, What is Marriage, *supra*, at 286 ("there is no truly neutral marriage policy"); Dent, G.W., Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359 (2011) ("Sensible scholars acknowledge that moral neutrality is not only undesirable but impossible."). Robert Reilly more fully explains Petitioners' disingenuous displacement of morality and tradition:

> The legal protection of heterosexual relations between a husband and wife involves a public judgment on the nature and purpose of sex. That judgment teaches that the proper exercise of sex is within the marital bond because both the procreative and unitive purposes of sex are best fulfilled within it. The legitimization of homosexual relations changes that judgment and the teaching that emanates from it. What is disguised under the rubric of legal neutrality toward an individual's choice of sexual behavior—"equality and freedom for everyone"—is, in fact, a demotion of marriage from something seen as good in itself and for society to just one of the available sexual alternatives. In other words, this neutrality is not at all neutral; it teaches and promotes indifference, where once there was an endorsement.

Amici understand better than many that "tradition" alone cannot justify a law, no matter how hoary its pedigree. But *Amici* do not argue a State's Constitution should remain unmolested by the federal judiciary merely because it upholds long-standing tradition. Contrary to Petitioners' facile analysis, mere "tradition" is not the reason the State marriage definitions here are constitutional. The *reasons* for the tradition are the reasons that the States' laws are constitutional.

Of course, the reasons for the tradition here are entirely rational. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); What is Marriage, *supra*, at 248-259; M. Gallagher, Why Marriage Matters: The Case for Normal Marriage, available at http://marriagedebate.com/pdf/SenateSept42003.pdf; Straight is Better, *supra* at 359, 371-75.

As our tradition recognizes, some truths are self-evident. Among them are that men and women are different. In fact, it is clear from our very existence that men are made for women, and women for men. None of us would be here but for that truth. The Sixth Circuit properly recognized that "[i]t is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative." Pet. App. 33a.

Reilly, Robert R., Making Gay Okay: How Rationalizing Homosexual Behavior is Changing Everything, 13 (Ignatius Press, 2014).

Another self-evident truth is that it is best for children to be raised by their parents whenever possible. There have been many theories to the contrary throughout history, but they have all proven vacuous. Public policy that recognizes and acts on these truths is not unfairly discriminatory. In fact, the only way to have sound public policy is to build on such truths.

In inviting the Court to redefine "marriage," Petitioners reject these truths. The voters of Michigan, Kentucky, Ohio, and Tennessee, by an overwhelming majority, affirmed a truth upon which our nation was founded and has flourished for over two hundred years: that the natural family is the optimal environment in which children should be raised. Human history, scientific observations of human biology, and our own experience, common sense and reason tell us that children naturally come exclusively from opposite sex unions, and children benefit from being raised by their biological parents whenever possible. *See, e.g.* Straight Is Better, *supra* at 376, 378, 380-81; What is Marriage, *supra* at 258; M. Gallagher, (How) Does Marriage Protect Child Well-Being, in The Meaning of Marriage (R.P. George & J.B. Elshtain, eds.) (Scepter Publishers, Inc., 2010) at 197-212 (*see especially* 208-12 regarding gender roles).

To *Amici* and to most Americans, the proposed federalization and redefinition of marriage directly harms and threatens this sacred and foundational institution. There is no surer way to destroy an

institution like marriage than to destroy its meaning.[14] If "marriage" means whatever a political activist, a cherry-picked plaintiff, or a politically unaccountable appointed judge wants it to mean, it means nothing. If it has no fixed meaning, it is merely a vessel for an unelected judge's will. It is a subterfuge for judicial legislation. And as Montesquieu observed: "There is no greater tyranny than that which is perpetrated under the shield of law and in the name of justice." Charles de Montesquieu, Montesquieu's Considerations on the Causes of the Grandeur and Decadence of the Romans, 279 (Jehu Baker trans., Tiberius 1882).

Petitioners improperly urge this Court to overstep its authority and impose *Petitioners'* morality on the thirty-two million citizens of Michigan, Kentucky, Ohio, and Tennessee, usurping the right of each of these States to retain the traditional, truthful meaning of marriage. Pet. App. 15a. Article V of the Constitution exists for a reason, and that reason is to prevent such radical redefinition of our social contract by non-democratic means. A critical difference exists between interpreting and re-writing the Constitution, and Petitioners want that line crossed. As the Eight Circuit correctly held in *Citizens for Equal Protection v. Bruning*:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our

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[14] Destroying marriage by destroying its meaning is the admitted goal of many "same-sex marriage" advocates. *See, e.g.*, What is Marriage, *supra*, at 277-78 (citing numerous gay activists and supporters who openly advocate the destruction of traditional concepts of marriage and family).

> knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution.

455 F.3d at 870. It is no mere coincidence that this is so.

We ask you to imagine yourself sitting on the bench hearing oral arguments in 1868, shortly after the Fourteenth Amendment was ratified. Petitioners come before you and present their main argument: "The fourteenth amendment to the U.S. Constitution requires a state to license a marriage between two people of the same sex." Petitioners' Brief at 22. Look around you. What is the panel and audience's reaction? Is it nodding approval, as Petitioners insinuate?

If not, what has changed between then and now? There has been no further constitutional amendment, as Article V requires. All that has changed is the attitude of a minority of the population toward homosexual conduct. Petitioners believe that is all that is required for this Court to change the Constitution's meaning. We do not.

We believe that marriage should be defended, not redefined to suit the whims of certain individuals. This Court should reject Petitioners' argument because it violates the Constitution and undermines the family as the fundamental building block of our society by destroying the meaning of marriage.

III. THE SIXTH CIRCUIT CORRECTLY FOUND THAT RESPONDENTS' LEGITIMATE STATE ACTION PASSED RATIONAL BASIS REVIEW.

It is not the State's burden, on rational-basis review, to justify the State's traditional definition of marriage. Some lower courts in this challenge, such as the District Court for the Eastern District of Michigan, committed reversible error by placing the burden of proof on the state to establish a legitimate government interest. This Court has unequivocally held that "the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (citations and quotations omitted). In the challenge to Michigan's Marriage Amendment, the District Court cited the correct constitutional standard, but thereafter failed to actually apply it.

A law is constitutional even if it is "based on rational speculation unsupported by evidence or empirical data." *Id.* at 320. Courts simply do not have "a license to judge the wisdom, fairness, or logic of legislative choices." *Id.* As this Court has elsewhere noted: "The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" *Radice v. People of the State of New York*, 264 U.S. 292, 296 (1924) (citations and quotations omitted).

In matters involving a non-suspect classification, this Court permits both under- and over-inclusiveness in the drafting of such laws. All the state is required to show is that the definition rationally advances a

legitimate state interest. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 385 (1947). Because Respondents' current definition of marriage rationally advances the State's interests, *e.g.*, promoting procreation and effective parenting, the Sixth Circuit Court properly rejected Petitioners' Equal Protection claim as a matter of law.

In the challenge to Michigan's Marriage Amendment, in order for the District Court to reach its iconoclastic conclusions, the District Court turned traditional rational basis review on its head. Pet. App. 106a, 125a-134a. The District Court first offered a series of rationalizations to bolster the factual inadequacies and limitations of Petitioners' expert testimony and to attack the testimony of Respondents' experts. But in the end, the lower court concluded that because the *State* failed to demonstrate a measurable difference in some select child-rearing "outcomes" that the lower court arbitrarily deemed decisive, the millions of citizens who defended Michigan's marriage laws were irrational for not endorsing homosexual conduct as a matter of public policy.

In deciding to redefine marriage for the State, the federal district court held that Michigan voters were *irrational* in affirming a notion upon which our nation was founded and has flourished for over two hundred years: that the natural family is the optimal environment in which children should be raised. Pet. App. 127a-13a.

In rejecting of the convictions of millions of voters, the District Court relied on the testimony of several individuals it deemed "experts" on the issue of child rearing who claimed there is "no difference" between

heterosexual and homosexual couples raising children. Pet. App. 77a, 111a, 118a, 121a, 123a, 129a. Remarkably, the lower court found all the "experts" supporting the proposition to be "highly" or "fully" credible, and it found all who testified against Petitioners' "no difference" theory to have no credibility at all. *See, e.g.*, Pet. App. 77a, 79a, 109a, 111a, 113a-16a, 118a, 121a, 123a, 129a.

The District Court failed to provide an adequate basis for its conclusion that this testimony supported the conclusion of "no difference." The District Court never satisfactorily established which criteria were relevant to its inquiry—*i.e.*, which differences matter, and why. The District Court seems to have relied primarily on the testimony of Mr. Brodzinsky in determining that: "What matters is the 'quality of parenting that's being offered' to the child." Pet. App. 108a. And the court adopted Mr. Brodzinsky's wholly inadequate definition of parental quality. Pet. App. 108a, 109a, 111a, 127a, 129a.

But the District Court failed to articulate any "scientific basis" for why certain qualities the "experts" chose and purported to measure are the qualities we as a people must adopt and endorse. What are the so-called experts' qualifications to make moral decisions about what makes for good parenting? The evidence that these social scientists actually measured *those* crucial factors—or are in any way qualified to even identify, much less measure, those factors— is nowhere in the record.[15]

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[15] The experts largely purported to measure one or more facets of children's school performance, which the court then erroneously

Ultimately, these simply are not "scientific" matters. Materialistic science cannot measure the non-material. It cannot define or select morality, values, or the necessary components of a "successful" family, much less measure these factors. It is an injustice and exhibits a gross misreading of the Constitution to install such self-styled "social" experts as the moral compass of the population. These biased and flawed studies fail to demonstrate that an entire State's concept of family and marriage is irrational. Given the fundamental errors in the District Court's premises and reasoning, its factual findings are unreliable and cannot provide a stable foundation for this Court to make a monumental, nation-wide, and permanent change in our marriage laws.

The District Court also stated that "Rosenfeld's study shows that children raised by same-sex couples progress at almost the same rate through school as children raised by heterosexual couples." Pet. App. 127a. Leaving aside the fact that progress through school is hardly a conclusive measure for an optimal child-rearing environment,[16] this obviously does not

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equated to "healthy development," Pet. App. 122a, 128a; and even that parameter was hardly conclusive in supporting the court's "no difference" thesis, Pet. App.128a-29a. There is no scientific basis for the conclusion that a child's well being is properly determined by checking whether he or she has dropped out of school or been held back a grade at some point. It is a reasonable factor to consider among many others, but not a factor that can "scientifically" be weighed.

[16] When it found it convenient to advance its argument, the court actually admitted that "[o]ptimal academic outcomes for children cannot logically dictate which groups may marry." Pet. App. 130a.

"refute" the premise that heterosexual couples make better parents. *See, e.g.*, G.W. Dent, Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359, 371-406 (2011).

The District Court also touted Brodzinsky's illogical opinion that "parental gender plays a limited role, if any, in producing well-adjusted children." Pet. App. 127a. This raises the obvious question of which parent it is that children can supposedly do without—the mother or the father? Curiously, the court and its experts failed to elucidate this particular point.

The court also failed to recognize that in trying to incentivize the optimal child-rearing environment, the State regularly provides preferences to a child's natural parents. In that sense, heterosexual couples regularly face the same issues articulated by Petitioners. For example, a heterosexual couple comprised of one remarried natural parent and one step-parent may provide a loving home for their child, but the vast majority of step-parents are not custodial parents. Their relationship with the child he/she raises is not indorsed or incentivized by the State. Step-parents face the same fears articulated by the Petitioners regarding the child's future if the spouse, the natural parent, dies. However, the State's treatment of step-parents does not amount to discrimination, nor does it mean that the step-parent's relationship with his or her child means less because the State recognizes others' rights before his or hers.

These are more than a few flaws with the District court judge's logic and "debate-ending" scientific foray. And under the applicable rational basis review—which

is the only constitutionally appropriate test, it is enough for the State to promote natural families merely because natural families provide *some* benefit to the healthy development of our children. *See, e.g.*, *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). Under our Federal Constitution, a State is entitled to promote what has proven to be the healthiest social structure for the rearing of children and propagation of society; and it is not required to simultaneously promote less healthy alternatives, no matter how popular they might be with certain "social scientists" or federal judges.

Lastly, the Sixth Circuit Court properly rejected Petitioners' heavy-handed push to ignore prudence when inflicting a radical social experiment on the population, especially by non-politically accountable judicial decree. Pet. App. 14a, 31a, 33a. The Sixth Circuit found it rational not to overrule millions of voters and redefine marriage, taking away from the State a right it has held since the inception of our democratic republic. Pet. App. 32a. The Sixth Circuit properly reversed the factually erroneous and politically-driven opinion of the District Court, which distorted the burden of proof and the factual record in order to legislate, not from the voting booth as the States' voters did, but from the bench.

The Dissent in the Sixth Circuit Opinion raised no legitimate objections to the Majority's exceptional analysis. The gist of the Dissent's lament was: "But what about the children?" Pet. App. 70a (Daughtery, J., dissenting).

Two key passages sufficiently illustrate the futility of the Dissent's objections. First:

> [M]arriage, whether between same-sex or opposite-sex partners, increases stability within the family unit. By permitting same-sex couples to marry, that stability would not be threatened by the death of one of the parents.

Pet. App. 82a.

If we understand "stability" to mean solely that the death of one parent has less of an adverse impact on the family, then the Dissent's argument more forcefully supports polygamous relationships than same-sex relationships.[17] This is the road to perdition they are on.

Second:

> Even more damning to the defendants' position, however, is the fact that the State of Michigan allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or

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[17] We believe that the stability of the family unit depends on multiple factors, and is seriously harmed by the gender confusion that an improperly defined family unit can foster, for example. On this latter point, we disagree with both the Dissent and the Majority. *See* Pet. App. 33a. We understand that government following proper procedures (such as amending the Constitution) may defy the natural order instantiated in the traditional family by falsely denominating same-sex or other "alternative arrangements" as so-called "marriages" and thus re-invent the family, but we believe they cannot avoid the consequences of that defiance.

> education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts.

Pet. App. 82a.

This argument ignores the correct legal standard. Over-inclusiveness and under-inclusiveness might not be ideal, but they are permissible in this context. This Court has long recognized that we do not live in an ideal world, and it has set the governing legal standards accordingly. *See Johnson v. Robison*, *supra* at 385. What Michigan, Ohio, Tennessee, and Kentucky, and its voters have done to promote marriage and the family is imminently rational. In contrast, no law authorizes this or any court to destroy marriage, and it is beyond irrational for a court to do so.

These loosely wound and superficially idealistic arguments of Petitioners and the Dissent are characteristic of the so-called "progressive" agenda that relentlessly attacks our nation's traditional family. They rely exclusively on emotionalism and generalization to blur critical legal distinctions and to impugn foundational institutions as "oppressive." They promise that their alternatives, which either are untested or have proven to be disastrous, will be better for us, and that they must be forced upon us for our own good or "for the children." Fortunately, our Constitution forbids such a tyranny of the minority; and, fortunately, this Court stands as guardian of our Constitution.

CONCLUSION

This Honorable Court should uphold the decision of the U.S. Court of Appeals for the Sixth Circuit that correctly abstained from re-defining and thus destroying the State-approved meaning of marriage.

Respectfully submitted,

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